

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MAUSER CORP.
Employer

and

Case 31-RC-8715

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1167
Union

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REPORT ON CHALLENGED BALLOT

WILLIAM G. KOCOL, Administrative Law Judge.

Statement of the Case

The United Industrial & Service Workers of America (herein the Petitioner) filed a petition on August 15, 2008, to represent certain employees of Mauser Corp. (herein the Employer). The United Food and Commercial Workers International Union, Local 1167, (herein the Union) represented employees of the Employer and joined the election process. The parties agreed to an election in the following unit of employees.

Included: All full-time and regular part-time production, maintenance, shipping and receiving employees and truck drivers employed by the Employer at its facility located at 9449 Santa Anita Avenue, Rancho Cucamonga, CA

Excluded: Office clerical employees, professional employees, lab technicians, QC manager, all other employees, guards and supervisors as defined in the Act.

An election held on September 25, 2008, resulted in 15 votes for the Union, 2 votes for the Petitioner, and 13 votes against being represented by either the Union or the Petitioner. The run-off election held on November 5, 2008, resulted in 16 votes for the Union, 15 votes against the Union, and 1 challenged ballot. A hearing was held on December 16, 2008, to resolve the challenged ballot.

Facts

5 The Union challenged the ballot of Jose Luis Tafoya on the basis that he is a supervisor/management employee and therefore ineligible to vote. No evidence was submitted at the hearing to show that Tafoya is a supervisor. Rather, the focus of the Union's evidence is that the Employer and the Union had previously agreed to exclude Tafoya from the unit. The Employer contends that notwithstanding Tafoya's exclusion from the historical unit, Tafoya works as a truck driver and therefore should be entitled to vote as part of the stipulated unit. The facts described below are largely undisputed.

10 The Union had a collective bargaining relationship with Russell-Stanley. The most recent contract between them ran from January 32, 2005 to January 30, 2009 and covered a unit of the:

15 Employer's production, maintenance, shipping and receiving employees and truck driving employees, but excluding all supervisors, lab technicians, QC manager, office clerical, professional and guards and other employees.

20 For purposes of this proceeding, I conclude that the stipulated unit and the historical unit are essentially identical. At some point during the term of the contract the Employer purchased Russell-Stanley and adopted the contract.

25 Christopher A. Marentes is a business agent for the Union and is responsible for representing the unit employees at Mauser. Apparently Tafoya, a long-term and skilled unit employee, informed the Employer that he might quit if he were not paid more money. The Employer raised the matter with the Union, explaining that it already had difficulty retaining employees in the second truck driver position and did want to lose Tafoya. On November 16, 2006, Marentes sent Stewart Gallaher, then the Employer's plant manager, the following letter regarding Tafoya.

30 I am sending you this letter to confirm what we discussed at the meeting we had on November 13, 2006 in regards to the truck driver, Jose Tafoya. The understanding we have is that the truck driver position will remain intact per the contract. Jose Tafoya will be offered a coordinator position to oversee truck
35 driver position that is union. The Company will replace the position left open by Jose Tafoya with a union member. We understand that the coordinator position is a part of management in accordance to the job description that was forwarded to the Union. Let me know if you are not in agreement with this understanding.

40 The Employer did not reply, thereby signaling its agreement. The job description mentioned above is for the position "Transportation Coordinator." The "Reporting Relationships" for the position is "Shipping/Receiving Manager." The "Job Summary" is "To manage the plants fleet of trucks, including maintenance and repair, as well as administration of acquiring and replacing vehicles." The job description lists ten "Essential Functions" none of which are
45 supervisory or managerial in nature, at least as defined by the Act. Tafoya accepted the offer of the transportation coordinator position, received a pay raise, was no longer part of the unit, and withdrew his membership from the Union. Thereafter Tafoya's name no longer appeared on the seniority list of unit employees that the Employer regularly supplied to the Union, the most recent being September 2008. Nonetheless Tafoya continued to perform work as a truck driver;
50 in addition he oversaw and trained the employee who filled his former position as a unit truck driver. Again, there is no evidence that Tafoya performed any supervisory or managerial functions as defined by the Act.

Tafoya's name, however, did appear on the Excelsior lists the Employer provided for the first and second election in this matter. Tafoya voted without challenge in the first election; Marentes explained this was on oversight on his part.

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Analysis

The Employer and the Union agreed that Tafoya would be excluded from the historical unit. Of course, the Petitioner had no knowledge of this arrangement but the Petitioner is no longer involved in this proceeding. At this point this case is the functional equivalent of a decertification election. In these cases the election must be conducted in a proper existing unit and not in a newly constructed unit. Under these circumstances it is clear that Tafoya ballot should not be counted. I recognize, as the Employer points out in its brief, that typically in an RC petition case the Board applies a three-part test in resolving issues of unit placement. *Butler Asphalt*, 352 NLRB No. 32 (2008); *Caesar's Tahoe*, 337 NLRB 1096 (2002). But even applying that test, I reach the same result. I first conclude that the stipulation is ambiguous because while it includes "truck drivers" it excludes "all other employees." While Tafoya performed some truck driving functions his title was "Transportation Coordinator." Thus, under the stipulation he could be both included as a truck driver and excluded as a transportation coordinator under all other employees. Turning next to the parties' intent, it seems to be clear that as between the Employer and the Union they intended to have the election in the existing unit and not in a different unit. The Employer, having sought and obtained Tafoya exclusion from the unit should be held to its part of the bargain absent evidence of mutual consent otherwise. Under these circumstances I find it unnecessary to address the Union's argument that agreement it had with the Employer was akin to an agreement covered by *Norris-Thermador, Corp.*, 119 NLRB 1301 (1958).

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Conclusion

I conclude that the challenge to the ballot of Jose Luis Tafoya is sustained and the case be remanded to the Regional Director for the issuance of an appropriate certification of representative.¹

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Dated, Washington, D.C. February 2, 2009

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William G. Kocol
Administrative Law Judge

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¹ Pursuant to Sec. 102.69 of the Board's Rules and Regulations, any party may, within fourteen (14) days from the date of this decision, file with the Board in Washington, D.C., an original and eight (8) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing them shall serve a copy on the other parties and shall file a copy with the Regional Director of Region 31. If no timely exceptions are filed, the Board will adopt the recommendations set forth herein.